

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PERRY JOHN PAUS,

Defendant-Appellant.

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UNPUBLISHED

April 17, 2007

No. 266883

Wayne Circuit Court

LC No. 05-003313-01

Before: Wilder, P.J., and Sawyer and Davis, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of assault with intent to do great bodily harm less than murder, MCL 750.84, and sentenced to 24 to 120 months' imprisonment. He appeals as of right. We affirm.

I. Other Acts Evidence

Defendant, who was charged with physically assaulting his live-in girlfriend, argues that the trial court erred in allowing evidence of other physical assaults against the victim. We disagree.

The admissibility of bad acts evidence is within the trial court's discretion and will be reversed on appeal only when there has been a clear abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). The abuse of discretion standard is more deferential than de novo review. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). This standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome. *Id.* When the trial court selects one of these principled outcomes, it has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court's judgment. *Id.*

The admissibility of evidence of a defendant's other bad acts is governed by MRE 404(b)(1), which provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity,

or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

To be admissible under MRE 404(b)(1), bad acts evidence must satisfy three requirements: (1) it must be offered for a proper purpose, (2) it must be relevant, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998).

Evidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system. *People v Sabin (After Remand)*, 463 Mich 43, 63; 614 NW2d 888 (2000). Further, logical relevance "is based on the system, as shown through the similarities between the charged and uncharged acts, rather than on defendant's character, as shown by the uncharged act." *Id.* at 63 n 10. Relevant similar acts are not limited to circumstances in which the charged and uncharged acts "are part of a single continuing conception or plot." *Id.* at 64. In *Sabin*, the Court explained that the evidence of other acts " 'must indicate the existence of a plan rather than a series of similar spontaneous acts,' " but unlike evidence of other acts used to prove identity, " 'the plan need not be unusual or distinctive; it need only exist to support the inference that the defendant employed that plan in committing the charged offense.' " *Id.* at 65-66 (citation omitted).

In this case, the evidence indicated that the victim sustained several injuries on August 21, 2004, but defendant denied assaulting the victim or causing the injuries. The evidence showed that the prior assaults described by the victim were sufficiently similar to the charged assault to justify admitting the prior assaults under the common plan or scheme exception. The charged and uncharged conduct all involved the same victim, they all occurred at the couples' residence, and they all followed verbal arguments, which ended with defendant physically assaulting the victim. The evidence indicated that immediately before the charged assault, defendant and the victim began arguing outside after the victim accused defendant of embarrassing her in front of coworkers at a social event. According to the victim, after going inside the house, defendant physically assaulted her. The other acts evidence was relevant to show that the charged assault occurred as the manifestation of a common plan or scheme of physically assaulting the victim inside the couple's home following an argument. Further, in light of the trial court's cautionary instruction, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice.

We also reject defendant's argument that he was unduly prejudiced by evidence that one of the other assaults led to a conviction for domestic violence. This evidence was probative of the victim's credibility, a principal issue at trial, and, therefore, was relevant. *People v Mills*, 450 Mich 61, 72; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995). Although defendant denied committing other assaults, he admitted committing the conduct that led to the domestic violence conviction, which itself was admissible under MRE 404(b)(1). In this circumstance, any prejudice arising from the fact of conviction, apart from the conduct that led to the conviction, was minimal. Thus, the probative value of the evidence was not substantially outweighed by any prejudicial effect.

For these reasons, we conclude that the trial court did not abuse its discretion in admitting the other acts evidence.

## II. Right to Present a Defense

Defendant next argues that the trial court's evidentiary rulings effectively denied him his constitutional right to present a defense.

In support of this claim, defendant first argues that the trial court impermissibly restricted his cross-examination of the victim. We disagree.

The scope of cross-examination is within the discretion of the trial court, and neither the Sixth Amendment's Confrontation Clause nor due process confers on a defendant an unlimited right to cross-examine on any subject. *People v Canter*, 197 Mich App 550, 564; 496 NW2d 336 (1992). Cross-examination may be denied with respect to collateral matters bearing only on general credibility, as well as irrelevant issues. *Id.*

In an attempt to impeach the victim's testimony that defendant physically assaulted her in January or February 2003, defense counsel sought to introduce evidence of an email communication that the victim sent to defendant toward the end of February 2003, in which the victim raised the issue of marrying defendant. The victim denied recollection of the specific email, but admitted that she may have discussed marriage plans with defendant during this time frame. Contrary to what defendant argues, the trial court allowed defense counsel to question the victim about the issue of marriage and the email communication. The court merely prohibited excessive questioning about the couple's marriage plans and the victim's husband's divorce filing, because these were collateral matters. Under the circumstances, the trial court's limitation on cross-examination did not deprive defendant of his right to present a defense and was not an abuse of discretion.

Defendant also argues that the trial court erroneously prohibited him from calling two witnesses, who defendant maintains would have offered valuable impeachment testimony. We disagree.

Extrinsic evidence of the victim's prior inconsistent statements was not admissible to impeach her testimony unless she was afforded an opportunity to deny the same and the prosecution was afforded an opportunity to interrogate her. MRE 613; *People v Rodriguez*, 251 Mich App 10, 34; 650 NW2d 96 (2002). As the trial court noted, these foundational requirements were not satisfied with respect to witness Hutchins and, therefore, the trial court properly excluded Hutchins's testimony. Furthermore, any error would have been harmless, given that defendant had already established through other witnesses that the victim was inconsistent in what she reported. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). Also, evidence that the victim was "clumsy drunk" on other occasions, offered to prove that she must have been so on the evening in question, was inadmissible under MRE 404(b)(1).

There is no merit to defendant's claim that the trial court allowed the prosecutor to inquire about a November 2004 assault, but denied defendant this same opportunity. The record discloses that both sides were permitted to explore this matter in questioning. The only instance in which the court prohibited further inquiry was when defense counsel asked defendant if he

remembered what the prosecutor told him would happen if he didn't enter a plea in that matter, and defendant answered, "No." Because defendant claimed a lack of knowledge of being told anything by the prosecutor, there was nothing further to explore in this regard. The trial court did not abuse its discretion.

### III. Trial Court's Conduct

Defendant next argues that the trial court's conduct pierced the veil of judicial impartiality and denied him a fair trial. We disagree.

A trial court has wide discretion and power in matters of trial conduct. *People v Conley*, 270 Mich App 301, 307; 715 NW2d 377 (2006). The record discloses that the trial court interrupted defense counsel's opening statement in order to prevent counsel from impermissibly arguing the case. Further, the court's comments and conduct during trial, for the most part, involved attempts to ensure that only relevant and admissible evidence was placed before the jury, which is a proper function of the court. *People v Ullah*, 216 Mich App 669, 674; 550 NW2d 568 (1996). Other challenged conduct occurred outside the jury's presence, so it could not have influenced the jury against defendant. Although some of the court's conduct toward defense counsel could be viewed as rude or abrupt, viewed as a whole, the record does not reflect that the court's conduct pierced the veil of judicial impartiality or was calculated to unduly influence the jury against defendant. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995). Defendant was not denied a fair and impartial trial.

### IV. Jury Instructions

Defendant argues that the trial court's preliminary instructions regarding the presumption of innocence and reasonable doubt were erroneous. We disagree.

This Court reviews jury instructions in their entirety to determine whether there is error requiring reversal. This Court will not reverse a conviction if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights. *People v Gonzalez*, 256 Mich App 212, 225; 663 NW2d 499 (2003).

Defendant correctly observes that the trial court did not rely on the standard criminal jury instructions when discussing the presumption of innocence and the concept of reasonable doubt in its preliminary jury instructions. However, this alone was not error because the court was not required to use the standard instructions. *People v McFall*, 224 Mich App 403, 414; 569 NW2d 828 (1997). The court's duty was to inform the jury that defendant is presumed innocent and that this presumption adheres until it is overcome by proof beyond a reasonable doubt to the contrary. *People v Potter*, 89 Mich 353, 355; 50 NW 994 (1891).

The court instructed the jurors that an accused is presumed innocent of the offense, that this presumption should be foremost in their minds, and that the presumption continues throughout the trial, even as they deliberate. The court followed up by linking this concept to the burden of proof, explaining that the burden rests with the prosecution and is never with the defendant, and that the presumption of innocence continues unless overcome by proof beyond a reasonable doubt. Viewed as a whole, the court's discussion of the presumption of innocence

conveyed the principal concepts of the standard jury instruction, CJI2d 1.9(1), i.e., that a person accused of a crime is presumed innocent and that this presumption continues throughout trial.

The trial court's discussion of reasonable doubt expanded on the standard jury instruction, CJI2d 1.9(3), but viewed as a whole, it too conveyed the key aspects of the standard instruction. Specifically, the court explained, consistent with CJI2d 1.9(3), that a reasonable doubt is not a "mere possibility," and it twice emphasized that a reasonable doubt must be based on "reason" and "common sense." The court's expanded discussion was merely an attempt to enhance the jury's understanding of these concepts.

We conclude that the trial court's instructions fairly presented the presumption of innocence and the concept of reasonable doubt and sufficiently protected defendant's rights.

Defendant also argues that the trial court's instructions, including its lesser offense instructions, improperly revealed the court's opinion of defendant's guilt. Because defendant did not timely object to the court's instructions on this basis at trial, this issue is not preserved and our review is limited to plain error affecting defendant's substantial rights. *Rodriguez, supra* at 24. After reviewing the instructions, we find no reasonable basis for concluding that the court somehow improperly expressed its own view of the case. No plain error is evident.

## V. Sentencing

Defendant argues that the trial court erred in scoring offense variables 7 and 10 of the sentencing guidelines. We disagree.

The sentencing court has discretion in determining the number of points to be scored provided there is evidence on the record that adequately supports a particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). Scoring decisions for which there is any evidence in support will be upheld. *Id.*

The trial court scored 50 points for OV 7, aggravated physical abuse. At trial, the victim testified that defendant grabbed her, slammed her head down onto a wooden floor, slammed her face into the walls, kicked her, threw her down the stairs and, in the process, her neck was caught on the banister. Defendant then picked her up, threw her onto a cement floor, and then placed his shoe on her jaw as if he was going to crunch down on her face. According to the victim, there was blood all over the floor, and she felt it seeping down her body. The evidence was sufficient to support the 50-point score on the basis of excessive brutality. MCL 777.37(1)(a).

The trial court scored ten points for OV 10, exploitation of a vulnerable victim. Ten points are to be scored if the offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship. MCL 777.40(1)(b). In this case, it was undisputed that defendant and the victim were involved in a domestic relationship, and there was also evidence that defendant repeatedly abused the victim during that relationship. Further, there was a disparity in the victim's age compared to defendant. Thus, there was sufficient evidence to support a ten-point score on the basis that defendant either exploited a domestic relationship or exploited the victim's vulnerability on account of her agedness.

Finally, the trial court's comments at sentencing were not improper. The court merely expressed its own observations of the evidence and defendant's reasons for presenting it. Contrary to what defendant argues, the court's remarks were supported by the trial evidence, and the court did not require defendant to provide an explanation.

For these reasons, resentencing is not required.

Affirmed.

/s/ Kurtis T. Wilder  
/s/ David H. Sawyer  
/s/ Alton T. Davis